

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Implementation of the Cable Television
Consumer Protection and Competition
Act of 1992

MM Docket No. 92-259

Broadcast Signal Carriage Issues
Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

MM Docket No. 90-4

Request by TV 14, Inc.
to Amend Section 76.51 of the
Commission's Rules to Include
Rome, Georgia, in the Atlanta,
Georgia, Television Market

MM Docket No. 92-295
RM-8016

To: The Commission

REVISED PETITION FOR RECONSIDERATION

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May 10, 1993

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SUMMARY

Cypress Broadcasting, Inc., licensee of television station KCBA, licensed to Salinas, California, requests reconsideration and reversal of the Commission's decision in this proceeding to the extent the Commission's decision accorded must-carry rights to stations in the home county in which their city of license is located. Cypress seeks reconsideration and reversal for the following reasons.

The Commission's decision is in direct violation of the Cable Act in that it purports to accord KNTV, licensed to San Jose, California, and similarly situated stations, must-carry rights in an entire "county" outside of their Arbitron designated ADI. The Cable Act limits the Commission's ability to accord stations must carry-rights only to additional "communities" outside of their ADIs.

Further, while the Cable Act does allow the Commission to accord stations must-carry rights in additional communities outside of their markets, the Cable Act requires that such Commission action must be based upon a full factual record, the requirements of which are specifically set forth in the Cable Act. The Commission had no such record evidence to support its decision to afford KNTV must-carry rights outside of its ADI.

While the Cable Act precludes the Commission from adding counties to the ADI of any particular station in the manner attempted by the Commission, the Cable Act does not preclude the

Commission from initiating a rulemaking proceeding to add a county to the definition of a market.

In addition to being contrary to the Cable Act, the Commission's decision also violates the requirements of procedural due process in that Cypress and the general public were never given notice that the Commission might adopt the home county exception to the must-carry rules and were not given an opportunity to be heard on that exception.

The Commission's decision also is contrary to the public interest in that it exacerbates an existing imbalance in market

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To: The Commission		

REVISED PETITION FOR RECONSIDERATION

Cypress Broadcasting, Inc. ("Cypress"), licensee of television station KCBA, Channel 35, licensed to Salinas, California, hereby petitions for reconsideration of the Commission's Report and Order in the above-captioned proceeding. Specifically, Cypress requests reconsideration of that portion of the Commission's Report and Order which ruled that a television station will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county. Report and Order, MM Docket No. 92-259 et. al., FCC-144, released March 29, 1993 at para. 39.

Cypress seeks reconsideration of the Commission's decision on the grounds that the decision is contrary to the express

requirements of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"). In addition, the Commission failed to give adequate notice that it might adopt this exception to the statutorily required must-carry rules. Cypress also seeks reconsideration because the Commission's decision is not in the public interest in that it will provide KNTV, a San Jose

regulations adopted by the FCC in the above-captioned Report and Order. Granite Comments at 9.

2. Based upon this situation described by Granite, the Commission ruled in its Report and Order that:

[E]ach television station will be considered local in those counties listed in the same ADI to which it is assigned. We will make one exception, however: Each station also will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county.

Report and Order at para. 39 (emphasis added).

3. The Commission added in a footnote that:

We note the case of KNTV, San Jose, which is assigned to the Salinas-Monterey ADI, even though its home county, Santa Clara, is considered part of the San Francisco ADI.

Id. at para. 39, n. 108.

4. As Cypress shall explain below, the Commission's decision to accord KNTV this special treatment is not permitted under the Cable Act, denied Cypress notice and an opportunity to be heard and is not in the public interest.

II. THE COMMISSION'S DECISION IS CONTRARY TO THE EXPRESS LANGUAGE OF THE CABLE ACT

5. The Cable Act sets forth very specific requirements with respect to the must-carry rights which the Commission is to accord television stations. At Section 614(a) the Cable Act provides:

Each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.

47 U.S.C. Section 614(a).

6. At Section 614(h)(1)(A), the Cable Act defines "local commercial television station" as follows:

In General -- For purposes of this section, the term "local commercial television station" means any full power television broadcast station,... licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

47 U.S.C. Section 614(h)(1)(A).

7. The Cable Act in Section 614(h)(1)(C)(i) specifies exactly how a station's television market is to be determined:

For purposes of this section, a broadcast station's market shall be determined in the manner provided for in Section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991....

47 U.S.C. Section 614(h)(1)(C)(i).

8. As the Commission explains in its Report and Order, Section 73.3555(d)(3)(i) has been renumbered as Section 73.3555(e)(3)(i). Report and Order at para. 37, n.100. Section 73.3555(e)(3)(1) of the Commission's Rules defines a broadcasting station's market as its Arbitron ADI. As recognized by Granite and

[F]ollowing a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

47 U.S.C. Section 614 (h)(1)(c)(i) (emphasis added).

10. The Cable Act therefore clearly limits the Commission's ability to grant a station must-carry rights outside of its ADI. In such circumstances, the Cable Act allows the Commission to accord such station must-carry rights in additional "communities" outside of its ADI. The Commission's decision to accord KNTV and other television stations must-carry rights in a "county" outside of their ADIs is not permitted by the Cable Act and is in direct violation of the Cable Act.

11. That the Cable Act does not include "counties" in the definition of "communities" is clear from the Commission's rules and precedent. The Commission's cable television rules are very clear in distinguishing between "communities" and "counties" for purposes of television rights. Section 76.54(a) of the Commission's Rules, which relates to stations or cable systems seeking to demonstrate that a station is significantly viewed, makes clear distinctions between "counties" and "communities." That section specifically provides that "signals which are significantly viewed in a county" are "deemed to be significantly viewed within all communities within the county." 47 C.F.R. Section 76.54(a).

12. Section 76.54(a) clearly contemplates that a "community" and a "county" are distinct entities for purposes of the Commission's cable television rules. This distinction goes back at least to the adoption of the Commission's significantly viewed rules. See Cable Television Report and Order, 36 FCC 2d 143, 24 RR 2d 1501 (1972). On several occasions since 1972 the Commission has had occasion to explain its reasons for distinguishing between "counties" and "communities" for purposes of implementing its significantly viewed rules. In Desert Empire Television Corp, 7 FCC Rcd 4214, 71 RR2d 147 (M.M.B. 1992), the Commission commented on its distinction between "communities" and "counties":

In 1972, in adopting comprehensive cable television rules, the Commission established a nationwide list of significantly viewed signals.... While the list was based upon county-wide data the Commission recognized the inherent inadequacies of such data, but determined that the need 'to provide a base of signals' and for 'cable to get moving' warranted the use of such data at that time.... The Commission added, however, that in the future community-specific data would be required to add a signal to the list.

7 FCC Rcd 4214, 71 RR 2d at 150 (emphasis added).

13. This long standing distinction between "counties" and "communities" was a clear part of the Commission's rules and precedent at the time the Congress adopted the Cable Act. There is nothing in the Cable Act or its legislative history to demonstrate that the Congress intended to change the Commission's long standing distinction between "counties" and "communities." See Cable Television Consumer Protection and Competition Act of 1992, Conference Report, Report 102-862, September 14, 1992.

14. Thus, the Commission exceeded its statutory authority under the Cable Act by adopting a rule exception which gives must-carry rights to television stations in counties outside of their ADIs. Having exceeded its statutory authority, the Commission must reconsider and reverse its decision according some stations must-carry rights in counties outside of their ADI's.

III. THE COMMISSION 'S DECISION IS NOT SUPPORTED BY RECORD EVIDENCE AS REQUIRED BY THE CABLE ACT

15. As pointed out above, the Cable Act does afford the Commission a specific procedure for allowing a station to be treated as a must-carry station in communities outside of its market. The individual station must file a request to have additional communities added to its market. The Commission may consider such an individual request and rule that, as to the station filing the request, certain communities outside of its ADI are a part of that station's market for "must-carry" purposes.

16. The Cable Act also spells out the precise matters the Commission must consider in ruling on such an individual request by a station:

In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as --

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

47 U.S.C. Section 614(h)(1)(C)(ii).

17. Prior to issuing its Report and Order in this proceeding, the Commission had received no request from Granite, which complied with these four statutory requirements. Granite's Comments failed to address the following specific issues:

18. First, Granite failed to address whether other stations located in the same area have been historically carried on the cable system or systems within the affected community. Section 614(h)(1)(C)(ii)(I). Had Granite presented evidence on this matter it would have been obligated to advise the Commission that other stations in the Salinas-Monterey ADI -- those stations licensed to Salinas and Monterey -- are not carried on most of the cable systems outside of its ADI on which KNTV seeks to be carried. Thus, it is clear that KNTV is seeking to gain a carriage advantage over the other stations in the ADI. This is matter on which the statute requires each individual requesting station to provide specific evidence and on which KNTV has presented no evidence. Thus, the Commission had no evidence upon which to make the statutorily required finding.

19. Second, the Cable Act requires Granite to present evidence on whether any other station, that is eligible to be carried by a cable system in the affected community as a must-carry

**IV. THE COMMISSION MAY BY RULEMAKING REDEFINE THE SALINAS-MONTEREY
ADI TO INCLUDE SANTA CLARA COUNTY**

21. As noted above, in reconsidering its decision to accord stations must-carry rights in communities outside of their ADIs, the Commission may afford KNTV the opportunity to file a request with sufficient evidence to make the statutory showing justifying must-carry rights in additional "communities." Alternatively, if

action in this proceeding would create if it is not reconsidered and reversed.

V. THE COMMISSION DEPRIVED CYPRESS OF ITS DUE PROCESS RIGHTS BY FAILING TO GIVE NOTICE THAT IT MIGHT ADOPT THE HOME COUNTY EXCEPTION

23. An additional ground requiring the reconsideration and reversal of the home county exception to the must-carry rule is that the Commission gave no notice that it might adopt such a home county exception. When the Commission issued its Notice of Proposed Rulemaking ("NPRM") in this proceeding, it stated the following with respect to the options it was considering with respect to possible additions or subtractions of "communities" in the designation of markets for purposes of the must-carry rules:

To better reflect market realities and effectuate the purposes of this Act, Section 614(h)(1)(C) permits the Commission to add communities to or subtract communities from a station's television market following a written request. Furthermore, the Commission may determine that particular communities are part of more than one television market. The 1992 Act does not specify whether such requests are to be made by the broadcast station or cable operator. We ask for comment on a proposal to permit either party to make the request. We also seek comment on the appropriate procedures for the written request for communities to be added to or subtracted from the designated market. We believe it would be preferable to require parties requesting such determinations to file under the provisions of Section 76.7, procedures for petitions for special relief, rather than the rulemaking procedures set forth in Part 1, Subpart C. We believe that consideration of such requests could be expedited if they were filed as petitions for special relief. Would this process be adequate to afford all interested parties sufficient notice? We request comment on this proposal.

8 FCC Rcd 8055, 8059 (emphasis added).

24. Indeed, the Commission went on at length to discuss what information parties filing requests for addition or subtraction of communities might be required to submit:

The 1992 Act specifies that, when considering such requests, the Commission shall afford particular attention to the value of localism by taking into account such factors as 1) whether the station, or similarly situated stations, have been historically carried on the cable system or systems within such community; 2) whether the station provides coverage or other local service to the community; 3) whether any other station qualified for carriage provides coverage of news or programming of local interest; and 4) the local viewing patterns in both cable and noncable homes in the community. We ask parties to consider whether more specific or additional criteria are needed to implement this provision. In particular, we note that under the 1992 Act's definition of "market" the pool of eligible must-carry stations, in some cases, includes stations located hundreds of miles away from the cable system. Should we consider a specific mileage limit (e.g. 50. 70 or 100 miles) when determining whether a station's market should be modified for must-carry purposes? Should such criteria include a standard relating to a station's over-the-air viewability?

Id.

25. At no point in this extensive discussion in its NPRM did the Commission ever suggest that it would disregard the statutorily mandated market modification mechanism to allow the automatic addition of counties to the market of some stations. Cypress received no notice from the Commission in its NPRM, Granite did not serve Cypress with a copy of its Comments, and Cypress did not have constructive or actual notice of the Commission's intent to adopt the home county rule exception. This failure of notice is an additional ground requiring reconsideration of the Commission's decision. This failure to give notice is not just of theoretical importance. Cypress, as the licensee of a station in the Salinas-

Monterey ADI, has suffered a direct competitive disadvantage as a result of the Commission's surprise action benefiting KNTV.

VI. THE COMMISSION'S DECISION IS CONTRARY TO THE PUBLIC INTEREST BECAUSE IT WILL FURTHER DISTORT THE UNFAIR COMPETITIVE ADVANTAGE WHICH KNTV HAS IN THIS CITY'S MONTEREY MARKET

cable systems in both the Salinas-Monterey ADI and in the San Francisco-Oakland-San Jose ADI. With this dual ADI positioning, KNTV is able to command advertising rates comparable to those of San Francisco-Oakland-San Jose market stations. The ability to command these higher advertising rates allows KNTV the financial strength to bid more for programming than the actual Salinas-Monterey market stations.

28. KNTV has gained this unfair competitive advantage through a long history which includes an ill-advised decision by the Commission. In 1974, the Commission issued its Report and Order in Re Territorial Exclusivity in Non-network TV Programming, 46 FCC 2d 892, 29 RR 2d 1748 (1974) (Territorial Exclusivity Order). In the Territorial Exclusivity Order, the Commission adopted Section 73.658(m) of its Rules which places limits on the extent to which television stations may bargain with programming suppliers for exclusive broadcast rights in their respective markets. In hyphenated markets such as San Francisco-Oakland-San Jose, stations are allowed by Section 658(m) to obtain exclusive rights against all stations in the communities included in the hyphenated market.

29. The Report and Order adopting Section 73.685(m) was released by the Commission on May 2, 1974 and became effective on May 10, 1974. In the Territorial Exclusivity Order, the Commission did not grant a request by KNTV that Section 73.685(m) be written so as to exclude San Jose from the hyphenated market provision, i.e., the Commission rejected KNTV's argument that television stations licensed to San Francisco and Oakland should not be able

to enforce non-network programming exclusivity against television stations licensed to San Jose. In Re Territorial Exclusivity in Non-network TV Programming, 46 FCC 2d 892, 29 RR 2d 1748, 1753, 1758 (1974), see also Ralph C. Wilson Industries, Inc., 91 FCC 2d 127, 52 RR 2d 253 (1982).

30. Thereafter, KNTV immediately started a stream of legal proceedings involving the application of Section 73.685(m) to KNTV. On December 20, 1974, Gill Industries, Inc., the then-licensee of KNTV, filed a "Request for Interpretive Ruling" with the Commission seeking a waiver of the hyphenated market provisions of Section 73.685(m). In its Request, Gill asserted that it had made a showing justifying a waiver of the hyphenated market provisions of Section 73.685(m). The Commission denied Gill's request for a waiver of Section 73.685(m) for KNTV. Geographical Exclusivity In Non-Network Syndicated Programming, 37 RR 2d 695 (1976).

31. This rejection by the Commission spawned a "Petition for Reconsideration" filed by Gill on July 19, 1976. The Commission denied this Petition in March, 1977. Geographical Exclusivity in Non-Network Syndicated Programming, 40 RR 2d 473 (1977). On November 1, 1977, shortly after the Commission rejected Gill's petition for reconsideration, Gill filed a petition to deny the license renewal application for KGO(TV) which was and is licensed to San Francisco. Gill based its petition to deny on KGO's inclusion of KNTV within its syndicated programming exclusivity agreements with program suppliers, while KGO was not exercising non-network programming exclusivity against KSBW (licensed to

Monterey). American Broadcasting Cos., Inc., 46 RR 2d 1695 (1980).¹

32. The Commission denied the petition to deny, but indicated that Gill had shown facts from which the Commission concluded that it should give further consideration to the argument that KNTV should not be included in the San Francisco-Oakland-San Jose hyphenated market for non-network programming exclusivity purposes. Id. 46 RR 2d at 1699. The Commission noted in particular that, while KSBW (licensed to Monterey) served an area largely identical to that served by KNTV, KGO could not enforce exclusivity against KSBW, because Section 73.685(m) did not allow KGO to assert exclusivity rights against KSBW. While cautioning that it had not prejudged this matter, the Commission concluded that "... we will consider a showing that exclusivity protection is not required and discriminates against KNTV in light of the substantial service within KGO's service area by KSBW and other licensees." Id. Most San Francisco television stations, including KGO, dropped exclusivity against KNTV shortly after the Commission's decision was released. See Ralph C. Wilson Industries, Inc., supra 52 RR 2d at 254.

33. As a result of KNTV's success in this regard, KICU, a station licensed to San Francisco-Oakland, soon began a similar campaign to be treated as a Salinas-Monterey station for territorial programming exclusivity purposes. Thus far KICU's

¹ In 1978 Gill's license was transferred to KNTV, Inc., a subsidiary of Landmark Communications. As noted above, KNTV is now licensed to Granite.

efforts have proven unsuccessful. Ralph C. Wilson Industries, Inc., supra.

34. The pivotal point in the above-described history was the Commission's decision indicating to the other San Francisco-Oakland-San Jose market television stations that the Commission perceived some merit in KNTV's claim that the other stations in that market should not exercise their territorial exclusivity rights against KNTV. It is that determination that is now subjecting KCBA and other Salinas-Monterey television stations to competition for programming from KNTV, a station that in all other respects, except ADI designation, is a San Francisco-Oakland-San Jose market station.

35. Against this backdrop, the Commission's decision to accord KNTV must-carry rights in both the entire Salinas-Monterey market and a significant part of the San Francisco-Oakland-San Jose market will greatly exacerbate an already unfairly tilted competitive situation in the Salinas-Monterey market. For this reason, the Commission's decision is not in the public interest and should be reconsidered.

VII. CONCLUSION

36. Reconsideration is required because the Commission's decision fails to comply with the Cable Act. The Cable Act only permits the Commission to add "communities," not "counties," to its market definitions at the request of a specific station. In addition, the Cable Act specifies the procedures which must be

utilized and the factual record which must be developed to add a "community" to a station's market, and the Commission failed to follow those procedures or to develop the required record in adding Santa Clara County to KNTV's market. The record evidence required by the Cable Act was not developed by the Commission, and the decision is therefore arbitrary and capricious and not in accordance with the requirements of the Cable Act.

37. Additionally, the Commission failed to give Cypress and the general public notice that it might adopt the home county exception to the must-carry market designations, and failed to give Cypress and the general public an opportunity to be heard on that adoption. This failure of notice deprived Cypress of its procedural due process rights and requires that the Commission reconsider its decision.

38. Alternatively, while the Commission may not add a county to a market for the benefit of a single station in that market, the Commission may redefine a market to include a county for the benefit of all stations in that ADI. Therefore, the Commission may achieve the result adopted in its Report and Order by instituting a rulemaking proceeding to add Santa Clara County to the Salinas-Monterey ADI, with the result benefiting all stations in the Salinas-Monterey ADI.

39. Further, the Commission's decision to extend must-carry rights to KNTV deserves the public interest by providing an even greater competitive advantage to KNTV, a station licensed to San Jose, a community in the 5th Arbitron ADI. As a direct result of

the Commission's decision, KNTV will be able to exercise market power to the disadvantage of stations licensed to Salinas-Monterey, the 111th Arbitron ADI. On the other hand, there are important public interest reasons for limiting the market power of this San

~~San Jose station's market power to the disadvantage of stations licensed to Salinas-Monterey, the 111th Arbitron ADI.~~

CERTIFICATE OF SERVICE

I, Kathy Nickens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, do hereby certify that a copy of the foregoing "REVISED PETITION FOR RECONSIDERATION" was served this 10th day of May, 1993, by first-class postage mail to the following:

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